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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SESAI ANSELMO MIGUEL, Defendant and Appellant.	B290299 (Los Angeles County Super. Ct. No. BA448280)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed in part, reversed in part, and remanded.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Nikhil Cooper, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Sesai Miguel (defendant) on three counts of continuous sexual abuse of a child under 14 years old, with the three counts pertaining to three separate victims. On appeal, defendant seeks reversal of his conviction on one count pertaining to one of the minors (the Minor), and failing that, reversal of the One Strike law indeterminate sentence the trial court imposed for that count. Specifically, we are asked to decide whether there was substantial evidence at trial that defendant's sexual abuse of Minor occurred over at least three months, as required to constitute continuous sexual abuse under the charged criminal statute, and whether the imposition of a One Strike sentence violated ex post facto principles because there was insufficient evidence any of the abuse occurred after the date the One Strike law was amended to apply to convictions for continuous sexual abuse of a child.

I. BACKGROUND

A. The Offense Conduct Against Minor, as Established by the Evidence at Trial

Minor was born on December 25, 1997. She and her mother (Mother) lived in a small apartment on South Westlake in Los Angeles (the Westlake apartment). During the relevant time period, Minor's aunt (Aunt) and her minor cousins also lived with them.

Mother began dating defendant when Minor was around six years old, and defendant moved into the Westlake apartment. At the time, there were two beds in the apartment, which were close together in one room. Defendant, Mother, and Minor slept in one bed while Aunt and Minor's cousins slept in the other.

In 2004, Minor was alone with defendant in his car when he asked her if she wanted to learn how to drive. She said yes and defendant, who was sitting in the driver's seat, moved her on top of his lap. Minor was facing the steering wheel and put her hands on it. Defendant then grabbed Minor by the waist and started rubbing her back and forth against "his private area." Minor was not sure what he was doing, but it did not "feel right."

Subsequently, Minor was in the apartment closet with defendant when he leaned either against the wall or laundry stored in the closet, grabbed Minor by the waist, and rubbed her "butt" against his penis. Shortly thereafter, Mother returned home. She saw Minor and defendant were both in the closet, but she did not say anything. Minor could not remember her exact age when the abuse in the apartment closet took place, but she knew she was older than seven and she testified "I think I was older by then" when asked whether she was still in the first grade when the incident in the closet occurred.

Another incident occurred when Minor was between the ages of six and nine. Defendant picked Minor up from school and took her home. No one else was there. Defendant sat near the foot of the bed and sat Minor on top of him. He then laid back, with his feet off the bed, grabbed Minor's waist, and moved her back and forth against him so her "buttocks" were making contact "with his private area." A similar incident on the bed happened at least one other time.

Defendant stopped sexually abusing Minor when she left the apartment to go live with her kindergarten teacher, who later became her legal guardian. Minor did not tell anyone about defendant's abuse until she was sixteen, when she confided to a close friend that defendant had touched her inappropriately.

Roughly three years later, in July 2016, Minor's cousins, with whom she had not had much contact over the intervening years, visited her and said defendant had been inappropriate with them and had molested them. Minor began crying after hearing her cousins' disclosure and told them she had "had [her] own experiences with . . . defendant." Minor and her cousins then went to the police to report what defendant had done to them.

B. The Criminal Charges, and the Testimony at Trial Regarding When Minor Moved Out of the Westlake Apartment

The Los Angeles County District Attorney charged defendant with three counts of continuous sexual abuse of a minor in violation of Penal Code section 288.5, subdivision (a).[1] Each count alleged (in the conjunctive, as common for charging documents) that defendant had engaged in three or more acts of "substantial sexual conduct" and three and more lewd and lascivious acts. The information further included multiple victim allegations that (if found true) would subject defendant to an indeterminate sentence under what is commonly referred to as the One Strike law, section 667.61.[2]

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[1] There was one count for each of the three victims, i.e., Minor and her two cousins. As we have already noted, only the count involving Minor is challenged on appeal.

Undesignated statutory references in this opinion are to the Penal Code.

[2] Section 667.61 states any person convicted of several specified offenses, including continuous sexual abuse of a child in violation of section 288.5, shall be sentenced to 15 years to life in state prison if the prosecution proves one or more special

At trial on the charged offenses, Minor answered several questions concerning when she moved out of the Westlake apartment. The questions and answers are relevant for our purposes because Minor testified defendant's abuse stopped after she moved out and the date of her move provides some means of narrowing when the abuse transpired—particularly, when it ended.

Minor testified on direct examination that she moved out of the Westlake apartment when she was about nine years old and in the third grade, and that Mother was pregnant with Minor's half-brother when Minor moved out. Minor further testified on direct examination that she had never lived in the same home with her half-brother.

On cross-examination, Minor stated she thought she was "9 turning 10" when she moved out of the Westlake apartment. She also stated her half-brother was born in February 2006 and confirmed she was out of the apartment before he was born. Based on her birthdate of December 25, 1997, defense counsel then asked if that meant she actually would have been turning eight years old in December 2005. Minor agreed. When further asked if that meant she had been eight when she went to live with her kindergarten teacher, Minor answered, "I don't remember. I thought I was nine." Defense counsel then re-established Minor did not recall living in the apartment with her half-brother, and when asked if that meant she "had to have been

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circumstances, including the circumstance that the defendant has been convicted of committing the specified offense against more than one victim. (§ 667.61, subds. (b), (c), (e).)

eight years old when you left to go live with [the kindergarten teacher]," Minor responded, "I guess so, yes."[3]

Testimony from other witnesses about the timing of Minor's move varied. One of Minor's cousins testified Minor moved out of the apartment when she was about nine years old. Mother, on the other hand, testified Minor was seven when she moved out to live with the kindergarten teacher. Aunt testified Minor was between six and seven when she went to live with her teacher, but she also stated Minor would come back to stay with the family on weekends after moving out.

C. Verdict and Sentencing

The jury found defendant guilty of continuous sexual abuse as to all three victims. It also found true the allegation that defendant committed an offense against more than one victim within the meaning of the One Strike law.

The trial court sentenced defendant to 15 years to life on each of the three counts and ordered the sentences to run consecutively. The court orally imposed a $300 restitution fine pursuant to section 1202.4, subdivision (b), a $300 parole revocation fine pursuant to section 1202.45, a criminal conviction assessment of $30 pursuant to Government Code section 70373, and a court operations assessment of $40 pursuant to section 1465.8.

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[3] Minor did testify that after she went to live with her teacher, she would sometimes visit Mother and stay overnight at the Westlake apartment.

II. DISCUSSION

Defendant's challenge to the sufficiency of the evidence to support his conviction for continuous sexual abuse of Minor fails. Though Minor's testimony did not establish firm dates on which the abuse occurred, the jury could reasonably infer that one of the incidents she described occurred in December 2004 and another occurred at the earliest in the late spring or summer of 2005. That inference is sufficient, on review for substantial evidence, to establish the element of the offense requiring the abuse to have occurred over at least three months.

Defendant's One Strike law sentencing claim, on the other hand, has merit. The jury made no finding regarding whether defendant's abuse continued past September 20, 2006, the date upon which the One Strike law became applicable to violations of section 288.5, and without such a finding, the trial court did not have a valid basis upon which it could impose a One Strike sentence.

Finally, we do not pass on the merits of defendant's claim pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), raised via supplemental briefing. We are remanding for resentencing, and defendant can raise a *Dueñas* ability-to-pay objection at that time if he so chooses.

A. Substantial Evidence Supports the Jury's Finding That Defendant Abused Minor for at Least Three Months

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.) "'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.'" (*People v. Brooks* (2017) 3 Cal.5th 1, 57.)

In order to establish a violation of section 288.5, subdivision (a), the prosecution must prove (1) "[t]he defendant lived with *or* had recurring access to a child;" (2) "[t]he defendant engaged in three or more acts of substantial sexual conduct or lewd or lascivious conduct with the child;" (3) "[t]hree or more months passed between the first and last acts;" and (4) "[t]he child was younger than 14 years old at the time of the acts." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1158 (*Valenti*).) It is undisputed on appeal that the prosecution proved the first, second, and fourth of these elements. Defendant's sole contention is that the evidence presented was insufficient to establish beyond a reasonable doubt that, as he puts it, the acts occurred over "a period of time[ ] not less than three months in duration."

Precedent holds "the prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. Generic testimony

is certainly capable of satisfying that requirement . . . [but] 'the victim must be able to describe *the general time period* in which these acts occurred (e.g., "the summer before my fourth grade," or "during each Sunday morning after he came to live with us"), to assure the acts were committed within the applicable limitation period.' [Citations.] That is, while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 97 (*Mejia*); see also *Valenti*, *supra*, 243 Cal.App.4th at p. 1158.)

Here, Minor's testimony was not so vague that the jury could only speculate as to whether the acts occurred over at least a three-month period. Minor testified the incident in which defendant asked her if she wanted to learn how to drive and put her in his lap occurred in 2004. She believed she was either in kindergarten or first grade at the time but she did not remember having gone to school on the day it occurred. According to her testimony, then, the driving sexual abuse occurred when she was six years old, or perhaps seven, if it occurred in the last week of 2004.

As for the abuse that occurred in the closet, the prosecution asked Minor whether it occurred while she was still in first grade and Minor answered, "I think I was older by then. I don't know how old I was." In response to follow-up questions, Minor testified she was older than seven but was not sure if she was older than eight. She was certain, however, the incident occurred before she moved out of the Westlake apartment. Defendant makes much of Minor's admission on cross-examination that she may have moved out of the apartment at age eight rather than age nine, but the point at which she moved out is not important

for purposes of zeroing in on when this incident of sexual abuse in the closet occurred. Rather, Minor's answer to the question of whether she was still in first grade ("I think I was older by then") is the key testimony and allowed the jury to reasonably infer the abuse occurred, at the earliest, in the late spring or summer of 2005—i.e., after she was seven years old and had completed first grade.[4] Combined with Minor's testimony that the first instance of abuse (the simulated driving incident) happened in 2004, that means at least three months elapsed between these two acts of sexual abuse. And the time period between these two acts of abuse is enough to sustain the element requiring proof that "[t]hree or more months passed between the first and last acts" (*Valenti*, *supra*, 243 Cal.App.4th at p. 1158) no matter when exactly the other two instances of abuse that Minor described occurred.

B. Defendant's One Strike Sentence for Abusing Minor Is Inconsistent With Ex Post Facto Principles

Both the United States Constitution and the California Constitution forbid ex post facto laws, i.e., laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *People v. Grant* (1999) 20 Cal.4th 150, 158 (*Grant*).) We interpret the California Constitution's ex post facto clause

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[4] On appeal, defendant understands Minor's answer to the question in precisely this way, stating in his opening brief that Minor testified "she did not think she was still in the first grade at the time this incident occurred."

coextensively with its federal counterpart. (*People v. Snook* (1997) 16 Cal.4th 1210, 1220.)

California's "One Strike law is an alternative sentencing scheme[that] applies only to certain felony sex offenses. [Citation.] It mandates an indeterminate sentence of 15 or 25 years to life in prison when the jury has convicted the defendant of a specified felony sex crime (§ 667.61 [listing applicable crimes]) and has also found certain factual allegations to be true (§ 667.61, subds. (d), (e))." (*People v. Anderson* (2009) 47 Cal.4th 92, 102 (*Anderson*).) Though the One Strike law was enacted in 1994 (Stats. 1994, 1st Ex. Sess., ch. 14X, § 1, p. 8570; *Anderson*, *supra*, at p. 102), it was not made applicable to violations of section 288.5 until September 20, 2006 (Stats. 2006, ch. 337, § 33, p. 2639; see also *Valenti*, *supra*, 243 Cal.App.4th at p. 1174). Before that amendment, violations of section 288.5 were punished only by determinate sentences of 6, 12, or 16 years. (§288.5, subd. (a).)

Section 667.61 now provides, among other things, that a person convicted of continuous sexual abuse of a child in violation of section 288.5, "under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." (§ 667.61, subds. (b), (c)(9).) Subdivision (e)(4) of section 667.61 specifies the circumstance in which "[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

"'"A continuous course of conduct offense cannot logically be "completed" until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without

violating the ex post facto prohibition.'" ([*Grant*, *supra*, 20 Cal.4th] at p. 159.)" (*Valenti*, *supra*, 243 Cal.App.4th at p. 1175.) Additionally, where "the date of the last act of sexual abuse increase[s a] defendant's mandatory minimum and maximum sentences, the date [is] an element of each charged crime." (*Id.* at p. 1176.) "[A]ny fact that increases a defendant's minimum or maximum sentence is an element of the offense that must be submitted to the jury." (*Ibid.*)

Defendant argues the imposition of a One Strike sentence violates ex post facto guarantees because the evidence at trial was amenable to a conclusion that his abuse of Minor could have ended before the date on which section 667.61's amendment became effective.[5] Because the date of defendant's last act of sexual abuse increased his mandatory minimum sentence, it was an element of the charged crime. (*Valenti*, *supra*, 243 Cal.App.4th at p. 1176.) As *Hiscox* holds, where, as here, the jury was not asked to make a finding regarding the date of the offense or a finding that the offense occurred after the effective date of the statute, "the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after [the effective date of the statute]. [Citation.]" (*Hiscox*, *supra*, 136 Cal.App.4th at p. 261.)

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[5] The People argue defendant forfeited this claim by failing to object in the trial court to the One Strike sentence imposed. The forfeiture doctrine, however, does not apply because the ex post facto claim defendant advances may be raised on appeal even without an objection in the trial court. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 258-259 (*Hiscox*).)

There is conflicting evidence on the question of whether defendant sexually abused Minor after September 20, 2006. Minor testified defendant abused her while she was living in the Westlake apartment, and before she permanently moved in with her kindergarten teacher at age nine. Minor's cousin similarly testified Minor lived in the home until she was nine years old. Minor turned nine in December 2006.

Minor also testified, however, that she moved out of the Westlake apartment before her half-brother was born, which was in February 2006. When confronted with that fact on cross-examination, Minor reiterated she thought she was nine when she moved out, but ultimately conceded she "guess[ed]" she must have been eight.

Minor's testimony was therefore equivocal and would have permitted contrary inferences about when the sexual abuse stopped. It would have certainly permitted a reasonable inference that the sexual abuse stopped before Minor's half-brother was born in February 2006, which was before the pertinent amendment to section 667.61. The conflicting evidence prevents us from concluding we have "no reasonable doubt" one of the acts of abuse occurred after September 20, 2006, and this means we are compelled to hold defendant's One Strike indeterminate sentence on the count pertaining to Minor violates the ex post facto clause.[6] (*Hiscox*, *supra*, 136 Cal.App.4th at p. 261; see also *People v. Riskin* (2006) 143 Cal.App.4th 234, 243-246 (*Riskin*) [remanding for resentencing where defendant was

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[6] Because we conclude defendant's sentence on count two is invalid under ex post facto principles, we need not reach his instructional error arguments.

sentenced under One Strike law but evidence permitted plausible inferences that crimes occurred prior to the law's enactment].)

C. We Need Not Decide the Dueñas *Issue*

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880 (*Sheena K.*).) This forfeiture doctrine applies where a defendant fails to object to the imposition of fines and fees at sentencing. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729.)

"'"The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) "'The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . . '"'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"' [Citation.]" (*Ibid.*; see also *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

Relying on the recent opinion in *Dueñas*, *supra*, 30 Cal.App.5th 1157, defendant argues the imposition of the court

operations assessment, conviction assessment, and restitution fine was improper because the trial court did not first hold a hearing on his ability to pay. Defendant concedes, however, that he neither asserted he lacked the ability to pay nor objected to the imposition of the fine or fees below. The Attorney General accordingly contends defendant has forfeited these objections. We are remanding for a full resentencing in light of our holding there was sentencing error under the One Strike law and we therefore need not resolve the *Dueñas* contention. Defendant can raise any ability-to-pay objection at resentencing if he so chooses.

DISPOSITION

Defendant's sentence on count two is vacated and the matter is remanded for resentencing, which shall not include application of section 667.61, subdivision (b) as to that count. In all other respects, the judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.